RECENT DECISIONS.

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CARRIERS—DUTY TO RECEIVE AND TRANSPORT PASSENGERS.—The defendant, organized under Ch. 175 §§ 6646-6659 Comp. Laws of Mich. and duly licensed, was engaged solely in transporting people to its private pleasure grounds. It issued a ticket to the plaintiff reserving the right to reject any one deemed objectionable. The plaintiff was refused passage for prior ill-behavior and later brought suit. *Held,* the defendant was not a common carrier and furthermore its tickets were but revocable licenses. *Meisner* v. *Detroit etc. Ferry Co.* (Mich. 1908) 118 N. W. 14.

To establish that a company is a common carrier it must be proven that it is regularly engaged in a public business, *Murch* v. *The R. R. Co.* (1854) 29 N. H. 9, and that it holds itself out to the public as such. *Elkins* v. *Boston R. R. Co.* (1851) 23 N. H. 275. In the principal case there was no holding out as a common carrier of passengers. It was a private enterprise, cf. *Wood* v. *Leadbitter* (1845) 13 M. & W. 837, not a public ferry. See *Greer* v. *Haugabook* (1874) 47 Ga. 282. The license required in the Michigan statutes, seems to have been demanded under the police power rather than as an operative franchise. If an operative franchise had been necessary, its effect, irrespective of the holding out, as determining the public service nature of the corporation, appears never to have been decided. If it were a public ferry any one could for valid cause be excluded, *Barney* v. *Steamboat Co.* (1876) 67 N. Y. 301, or expelled; *Thurston* v. *U. P. R. R.* (1877) 4 Dill 321; but actions on former occasions would not afford a valid excuse for subsequent exclusion or expulsion. *Ford* v. *East La. R. Co.* (1903) 110 La. 414. In the principal case, however, the company not being a common carrier, the tickets were mere revocable licenses like theatre tickets; *People* v. *Flynn* (1907) 189 N. Y. 180; and consequently the exclusion was justified. The principal case seems sound in both holdings.

CONSTITUTIONAL LAW—DUE PROCESS—SELF-INCRIMINATION.—On appeal from a conviction in a State court, the defendant alleged that he had been denied due process in being compelled to incriminate himself. *Held,* the conviction was valid. *Twining* v. *New Jersey* (1908) 29 Sup. Ct. Rep. 14.

Beyond declaring "due process of law" equivalent to "the law of the land" guaranteed by Magna Charta, *Murray's Lessee et al.* v. *Hoboken etc. Co.* (1855) 18 How. 272, 276, the U. S. Supreme Court has not attempted a final definition of the phrase. *Davidson* v. *New Orleans* (1877) 96 U. S. 97, 104. Its decisions, however, indicate an intention to limit its scope to only those principles of free government which are fundamental. *In re Kemmler* (1889) 136 U. S. 436, 448; *Holden* v. *Hardy* (1897) 169 U. S. 336, 389; *West* v. *Louisiana* (1903) 194 U. S. 258, 263. In determining what are such principles, evidence of settled usage in England and in this country is relevant, *Hallinger* v. *Davis* (1892) 146 U. S. 314, 320, but not conclusive. *Brown* v. *New Jersey* (1899) 175 U. S. 172, 175. In a criminal trial, all requirements of the clause are satisfied if there is notice, a court of competent jurisdiction, and an opportunity to be heard. *Pennoyer* v. *Neff* (1877) 95 U. S. 714, 733; *Louisville etc. R. R. Co.* v. *Schmidt* (1899) 177 U. S. 236. Neither indictment by grand jury, *Hurtado* v. *California* (1883) 110 U. S. 516, nor trial by a petit jury is essential, *Hallinger* v. *Davis, supra,* nor, it would seem, is the privilege against self-incrimination. But see *State* v. *Height* (1902) 117 Ia. 650. Cf. Wigmore, Ev. III, 3102, n. 2. The maxim, *"Nemo tenetur seipsum accusare,"* grew out of the opposition to Ecclesiastical methods of procedure, and crept into the common law courts during the reign of Charles I. Wigmore, Ev. § 2250. It has no place in other legal systems, and although contained in every State constitution except those of New Jersey and Iowa, cannot be regarded either in its historical origin, or in its essential character, as more than a conservative and expedient rule of judicial conduct. Wig-

more, Ev. § 2251. The principal case is undoubtedly sound in denying to the maxim the protection of the Fourteenth Amendment.

CONSTITUTIONAL LAW—SUITS AGAINST THE STATE—DUAL CAPACITY OF A STATE.—A corporation of a sister State, alleging that a trust was created by a statute providing for the appointment of a commission to wind up the State Dispensary, brought suit in the Federal courts for the determination of its claim and to compel payment thereof. *Held,* since this was not a suit against the State, jurisdiction should be retained. *Murray* v. *Wilson Distilling Co.* (1908) 164 Fed. 1. See Notes, p. 165.

CORPORATIONS—NON-RESIDENT STOCKHOLDERS—ENFORCEMENT OF STATUTORY LIABILITY.—The receiver of a bankrupt Minnesota corporation brought suit against a Wisconsin stockholder under a Minnesota statute providing that, in a receivership proceeding, if the assets of the corporation are insufficient to pay its debts, the courts shall levy an assessment on all the stockholders, and authorizing the receiver to prosecute actions therefor, whether a stockholder be within or without the state. *Held,* the enforcement of the stockholder's liability should be denied. *Converse* v. *Hamilton* (Wis. 1908) 118 N. W. 190. See Notes, p. 168.

COURTS—EFFECT OF OVERRULING DECISION.—Under the construction of the language of a will, by the courts, at the time of the testator's death, the devisees had an estate in fee, which they mortgaged to the defendants. The effect of subsequent decisions was to deny them such an interest. *Held,* the subsequent decisions could not affect the right of the devisees and defendant mortgagee. *Hood* v. *Pennsylvania Society to Protect Children* (Pa. 1908) 70 Atl. 845. See Notes, p. 163.

CRIMINAL LAW—LARCENY—POSSESSION OF GOODS.—The defendant was indicted for stealing a pocket-book. *Held,* the presumption of ownership arising from possession was not sufficient to overcome the presumption of innocence. *State* v. *James* (Mo. 1908) 113 S. W. 232.

The principal case accepts literally East's definition that larceny is a feloneous taking of personal goods, without the consent of the *owner.* 2 East P. C. 524. The court, however, seems misled in applying the definition. Possession has always answered for a right of property against all save one entitled to immediate possession. *Commonwealth* v. *Butts* (1878) 124 Mass. 449. Thus, a bailee may sue in trover, *Bowen* v. *Fenner* (N. Y. 1863) 40 Barb. 383, and in an indictment alleging property in X, proof that X had possession and control is sufficient, even though he admittedly is not the real owner. *State* v. *Allen* (1889) 103 N. C. 433. Though property may not be stolen from a mere custodian, *State* v. *Jenkins* (1878) 78 N. C. 478, a defendant could be convicted for stealing goods from one who was himself a thief. *Commonwealth* v. *Finn* (1871) 108 Mass. 466; *Ward* v. *People* (N. Y. 1842) 3 Hill. 395. In the principal case the allegation of the possession of the pocket-book would seem sufficient, especially since possession suffices as a matter of substantive law and the questionable doctrine of conflicting presumptions appears to be entirely inapplicable. If the principal case were accepted, it might become impossible to convict one of stealing from a bailee.

CRIMINAL LAW—PRESENCE OF ACCUSED AT TRIAL.—The defendant, indicted for murder, and on bond, voluntarily absented himself during the rendition of the verdict. *Held,* the accused could not waive his right to be present at that time, in a capital felony case, either expressly or constructively. *Sherrod* v. *State* (Miss. 1908) 47 So. 554.

At common law the defendant's presence was imperative in all cases of treason and felony, i. e., those involving life or member of the accused, *Rex* v. *Ladsingham* (1671) T. Raymd. 193, and this right of presence was incapable of waiver by the accused. The rule is still applied in all felony cases in some jurisdictions. *State* v. *Hurlburt* (Conn. 1784) 1 Root 90; *Prine* v. *Comw.* (1851) 18 Pa. St. 103; and see *Lewis* v. *U. S.* (1892) 146

U. S. 370. This may have been due to the court's requiring the defendant's person for purposes of punishment, or to a desire to safeguard the defendant's rights, e. g., of polling the jury and making proper objections to the recording of the verdict, etc., at a time when his incarceration deprived him of the ability to act for himself. *Price* v. *State* (1858) 36 Miss. 531. In some jurisdictions, the necessity is statutory, and in such cases, the defendant's presence is required either as a public right, *Hopt* v. *Utah* (1883) 110 U. S. 574, or as essential to the jurisdiction of the court, *Maurer* v. *People* (1870) 43 N. Y. 1, in which events a waiver is ineffectual. A subsequent limitation in some jurisdictions of the privilege of waiver to cases of capital felonies, *State* v. *Kelly* (1887) 97 N. Car. 404; *Lynch* v. *Com.* (1878) 88 Pa. St. 189, favors the second view mentioned above, these cases alone being ordinarily non-bailable at common law. *Fight* v. *State* (1836) 7 Oh. 181. And in all such cases, the proper administration of justice has apparently demanded the right of waiver in order to prevent the accused from rendering ineffectual a trial proper in all other respects. *Fight* v. *State, supra; Comw.* v. *McCarthy* (1895) 163 Mass. 458; *Robson* v. *State* (1889) 83 Ga. 166; *contra, Sneed* v. *State* (1843) 5 Ark. 431. Upon these grounds, however, it would follow theoretically that a defendant in a capital felony case, once admitted to bail, should be privileged to waive his right of presence. See *Jackson* v. *State* (1887) 49 N. J. L. 252; *Prine* v. *State, supra.* The principal case, though illustrating the danger of adhering to the rule when the defendant is on bail, instances the force of the rules in *favorem vitæ*, and is correctly decided upon authority.

EQUITY—EQUITABLE CONVERSION—ATTACHMENT.—Plaintiff sues to clear certain land of a lien, under a judgment against him, secured shortly before the death of his father who had devised the land to his widow for life, then to be sold and proceeds divided among the heirs. *Held,* since the interest of plaintiff, a distributee, was personalty, it was not subject to levy. *Beaver* v. *Ross* (Ia. 1908) 118 N. W. 287.

Realty directed by will to be sold and the proceeds distributed is by the principle of equitable conversion regarded as personalty with reference to all claims under or through the will, 3 Pomeroy (3rd Ed.) 1166, even when the legal title does not vest in executors as trustees. *Ebey* v. *Adams* (1890) 135 Ill. 80. The equitable conversion takes place at the date of testator's death even though, by weight of authority, the sale be directed to be made at some later time, *McClure's Appeal* (1872) 72 Pa. St. 414; *High* v. *Worley* (1858) 33 Ala. 196; *Snell* v. *Tuttle* (N. Y. 1887) 44 Hun 324; but see *Moncrief* v. *Ross* (1872) 50 N. Y. 431; if the time will surely arrive. *Boshart* v. *Evans* (Pa. 1840) 5 Whart. 551, 561. For the principle of equitable conversion rests on the distributee's right to secure an actual conversion, which accrues at the testator's death, though not then enforceable. See 19 Harv. Law Review 321. Of the statements that the equitable conversion does not occur till the date when the sale was directed to be made, some rest on a confusion of equitable with actual conversion, see *Richey* v. *Johnston* (1846) 30 Oh. St. 288, 293, and others are mere *dicta.* See *Savage* v. *Burnham* (1858) 17 N. Y. 561 at 569. Plaintiff's interest as distributee was therefore at no time attachable as realty. See *Hunter* v. *Anderson* (1893) 152 Pa. St. 386; *Baker* v. *Copenbarger* (1853) 15 Ill. 103. His interest as heir after his mother's death and before sale of the property was not attachable, since it consisted of the bare legal title with no beneficial interest. Freeman, Executions (3rd Ed.) 173. And although the interest of the holder of the bare legal title who also has some beneficial interest in the land may be attached, *Drysdale's Appeal* (1850) 15 Pa. St. 457, the plaintiff's interest as distributee not being an interest in realty adds nothing to the naked title and the ruling of the court seems sound. See *Allison* v. *Wilson's Ex'rs* (Pa. 1825) 13 Serg. & R. 330, 333.

EVIDENCE—PRESUMPTIONS—REASONABLE DOUBT IN CIVIL CASES.—In an action on an insurance policy, not indemnifying against death by suicide,

the defendant pleaded in defense the insured's suicide. *Held,* to overcome the presumption against self murder, there should be evidence beyond a reasonable doubt. *Almond* v. *Modern Woodmen of America* (Kan. 1908) 113 S. W. 696.

The opinion is unclear as to whether an application of the "reasonable doubt" rule is necessary to overcome the presumption against suicide, or because the allegation of suicide involves a criminal charge which even in a civil case requires such proof. The necessity of evidence beyond a reasonable doubt has been held to apply in defenses to actions of slander for accusing the plaintiff of a crime, *Clark* v. *Dibble* (N. Y. 1837) 16 Wend. 601; *Wonderly* v. *Nokes* (Ind. 1847) 8 Blackf. 589, and in divorce cases where adultery was charged: *Berckmans* v. *Berckmans* (1864) 17 N. J. Eq. 453: though there is much authority *contra. Matthews* v. *Huntley* (1838) 9 N. H. 146; *Kincade* v. *Bradshaw* (N. C. 1824) 3 Hawkes 63; *Ellis* v. *Buzzell* (1872) 60 Me. 209. Generally, however, where acts punishable criminally are set up as a defense to insurance policies, the "reasonable doubt" rule is inapplicable. A preponderance of testimony will entitle a recovery, and under this view the principal case cannot be supported. *Schmidt* v. *N. Y. etc. Insurance Co.* (Mass. 1854) 1 Gray 529; *Kane* v. *Hibernia Ins. Co.* (1877) 39 N. J. L. 697; *Agen* v. *Metrop. Life Ins. Co.* (1900) 105 Wis. 217; *Home Benefit Association* v. *Sargent,* (1892) 142 U. S. 691. Even if the "reasonable doubt" rule was resorted to, in order to overcome the presumption against suicide, the decision is unusual. In civil cases, ordinarily a presumption only stands in lieu of proof and once challenged the issue is determined by a preponderance of testimony. *Ala. Gt. So. R. R. Co.* v. *Taylor* (1900) 129 Ala. 238; Wigmore Ev. § § 2490-2492. The presumption of legitimacy, however, on grounds of policy, can only be overcome by evidence sufficient to convince beyond a reasonable doubt. *Phillips* v. *Allen* (Mass. 1861) 2 Allen 453; *Orthwein* v. *Thomas* (1889) 127 Ill. 554. The position of the court may, perhaps, be explained if because of its opposition to insurance companies' frequent pleas of suicide, as a defense, it makes the presumption against suicide analogous to that of legitimacy and requires proof beyond a reasonable doubt. This however is nothing short of judicial legislation.

EXECUTORS AND ADMINISTRATORS—EXECUTOR'S TITLE—UNDISPOSED OF RESIDUE.—A will gave unequal specific legacies to the executors. There was no gift of the residue and no next of kin appeared. *Held,* the surviving executor takes the residuary personal estate, beneficially, and not as trustee for the Crown. *Atty. Gen.* v. *Jeffreys* (1908) 70 L. J. Ch. Div. 685.

At common law title to personalty not otherwise disposed of, vested in the executor for his own benefit, but this result being, as was supposed, not intended by the testator, equity considered many circumstances as indicative of an intention that the executor was merely a trustee for the next of kin. *Foster* v. *Munt* (1687) 1 Vern 473, note; *Farrington* v. *Knightly* (1719) 1 Peere Williams 545, note; Lowndes Legacies, p. 249 *et seq.* Although the Act of I William IV c. 40, recognized the equitable exceptions as the rule and provided that the fundamental presumption is that the executor holds title for the benefit of the next of kin, it preserved the rights of the executor under the common law when no next of kin appeared. *Read* v. *Steadman* (1859) 26 Beav. 493; *In re Bacon's Will* (1866) 31 Ch. Div. 460. The principal case was therefore rightly decided since unequal legacies to executors are not sufficient to overcome the common law presumption of absolute title in the executors. *Dacre* v. *Patrickson* (1860) 1 Drew & Sm. 182. Had that presumption been overcome, the question would then have become one of disposal of trust property upon failure of the trust, and it has been uniformly held in England that such personal property goes to the Crown as *bona vacantia. Milton* v. *Spicer* (1773) 1 B. C. C. 201; *In re Higginson and Dean* L. R. (1899) 1 Q. B. 325. The decision of the principal case does not seem possible in the United States, where the real nature of the executor's title does not appear to have been recognized, 2 Story Eq. Jurisp. § 1208; *Sinnott* v.

Kenaday (1899) 14 D. C. App. 1; Hill, Trustees (Am. Ed.) 123, and where it is generally declared that he holds merely in a fiduciary capacity. *Woodhouse* v. *Phelps* (1884) 51 Conn. 521; 1 Perry, Trusts § 94. In the absence of next of kin the property would escheat to the state, usually by statutory provision. Woerner, Am. Law of Administration, § 133.

FEDERAL PRACTICE—INJUNCTIONS—STATE RATE REGULATION.—By the Virginia Constitution railroad rates established by the State Corporation Commission were alterable by the State Court of Appeals. An action was brought in the Federal courts to enjoin the enforcement of rates fixed by the Commission. *Held,* Harlan, J., and Fuller, C. J., dissenting, the Federal courts will not enjoin the enforcement of the rate that violates the Federal Constitution, before its review by the Court of Appeals. *Prentiss* v. *Atlantic etc. Co.* (1908) 29 Sup. Ct. Rep. 67.

The decision rests on a liberal application of comity. Since it is well settled that commissions such as the one in the principal case, when they fix rates, are legislative rather than judicial, *Telegraph Co.* v. *Myatt* (1899) 98 Fed. 335; but see Mr. Justice Harlan's dissenting opinion, the injunction was not withheld as being directed against proceedings in a State court. See 9 COLUMBIA LAW REVIEW 80. Nor if it had not been held that the Court of Appeals in its rate revising capacity was legislative, would the Federal courts hesitate on grounds of comity to pass on the constitutionality of a State statute before the highest State courts had considered the question. See *Burgess* v. *Seligman* (1882) 107 U. S. 20 at 33. For even on the question of the validity of a statute under a State constitution, although a Federal court generally feels itself bound by any previous decision in the State court, *Douglas Co.* v. *Stone* (1903) 191 U. S. 507, 110 Fed. 812; but see *Carroll Co.* v. *Smith* (1883) 111 U. S. 556, the absence of State decisions will not bar Federal jurisdiction. *U. P. R. Co.* v. *Alexander* (1901) 113 Fed. 347. The principal case merely decides that a Federal court will not enjoin the enforcement of an unconstitutional statute before it has been ratified by the final State legislative authority, just as in *habeas corpus* cases it will not declare a statute unconstitutional before its review by the final state judicial authority. *Ex parte Royall* (1885) 117 U. S. 241.

FOREIGN CORPORATIONS—PLEADING COMPLIANCE WITH STATE STATUTES.—The plaintiff sued to restrain execution by a foreign corporation because in the former action the corporation had not shown compliance with the statutes requiring foreign corporations to obtain a certificate before doing business within the state. *Held,* non-compliance with the state statutes was a matter of affirmative defense. *Kelley* v. *R. J. Schwab & Sons Co.* (S. D. 1908) 118 N. W. 696.

Most of the states have enacted statutes similar to those in South Dakota, and the consensus of opinion is that the contracts of a delinquent foreign corporation made in the state, in the course of doing business therein are void and cannot be enforced. *Assurance Co.* v. *Rosenthal* (1870) 55 Ill. 85; *Insurance Co.* v. *Packet Co.* (Ky. 1873) 9 Bush 590; but see *Toledo T. & L. Co.* v. *Thomas* (1890) 33 W. Va. 566; *Gas Co.* v. *Smith* (1901) 27 Ind. App. 472. In all jurisdictions the corporation, if itself sued is estopped from setting up its own violation of the statutes as a defense. *Insurance Co.* v. *Rust* (1892) 141 Ill. 85. Jurisdictions, however, differ as to how compliance should be pleaded. One theory is based on the "presumption of right acting." 6 Thompson, Corporations §§ 7,883 and 7,965. The majority of the courts applying this view regard non-compliance as an affirmative defense. *Langworthy* v. *Garding* (1898) 74 Minn. 325; *Northrup* v. *Wills* (1902) 65 Kan. 769. New York and a few other states, however, regard the statutory provisions as conditions precedent, *Insurance Co.* v. *Wright* (1883) 55 Vt. 526, with which the corporation must allege compliance or else the complaint will be demurrable. *Sullivan* v. *Vernon* (1898) 121 Ala. 394; *Wood* v. *Ball* (1907) 190 N. Y. 217. If the allegations of the complaint, however, do not show that the corporation

was "doing business" within the state, a demurrer will not be upheld, as the case is beyond the purview of the statute and compliance is unnecessary. *Building Ass'n* v. *Haley* (1901) 132 Ala. 135; *Lumber Co.* v. *Improvement Ass'n* (1897) 55 Ark. 625. It is submitted that the New York rule, better gives effect to the probable intent of the legislature and is therefore preferable to the rule in the principal case.

FUTURE ESTATES.—REMAINDERS—VESTED OR CONTINGENT.—A testator devised property to his widow, and after her death to her children, but if no children to G and his heirs. *Held,* the devise to G and his heirs was a contingent remainder. *Galladay* v. *Knock.* (Ill. 1908) 85 N. E. 649.

The Illinois courts have not, a second time, fallen into the error made in *Boatman* v. *Boatman* (1902) 198 Ill. 414, of laying down a correct definition of a vested remainder only to misapply it in the case of a remainder to persons *in esse* dependent upon the contingency of the death of the life tenant without issue surviving. Cf. 3 COLUMBIA LAW REVIEW 213. Such a case tests Fearn's definition which makes the distinguishing characteristic of a vested remainder at common law, a present capacity to take effect in possession, should it become vacant immediately. *Brown* v. *Lawrence* (1849) 3 Cush. 390. That, however, is the proper test of a vested remainder under the statute in New York, Real Property Law § 30. *Moore* v. *Little* (1869) 41 N. Y. 66 at 77. *House* v. *Jackson,* (1872) 50 N. Y. 161; *Roosa* v. *Harrington* (1902) 171 N. Y. 341. The definition in the principal case, that a remainder is vested if "no further condition is imposed than the determination of the precedent estate" makes it necessary that the remainder shall be capable of vesting whenever the possession becomes vacant, *Kennard* v. *Kennard* (1884) 63 N. H. 303, irrespective of any collateral event. *Woodman* v. *Woodman* (1896) 89 Me. 128. This effectually distinguishes the true common law vested remainder from that which, though contingent at common law would be vested under the New York Statute.

HABEAS CORPUS—LEGAL EXISTENCE OF COURT—COLLATERAL ATTACK.—Relator sued out a writ of *habeas corpus,* alleging that the Municipal Court, which had sentenced him, was not legally created. *Held,* a court created under color of law, is a *de facto* court, the legal existence of which cannot be questioned collaterally. *State* v. *Bailey* (Minn. 1908) 118 N. W. 676.

It is universally held that the acts of an officer, who is the *de facto* incumbent of an office of recognized legal existence, cannot be questioned in collateral proceedings. The principal case holds that this doctrine, resting as it does on public policy, is equally applicable in cases involving a court established under color of law. See *Burt* v. *Winona R. R. Co.* (1884) 31 Minn. 472. A similar view is taken in several other states. *Trumbo* v. *People* (1874) 75 Ill. 561; *State* v. *Gardner* (1896) 54 Oh. St. 24. On the other hand, the majority of jurisdictions hold, by *dictum* if not by decision, that where there is no office *de jure,* there can be no officer *de facto,* since there can be none *de jure. Norton* v. *Shelby Co.* (1886) 118 U. S. 425. In many cases, usually cited for the proposition that there can be no *de facto* court, there was not even colorable jurisdiction, and the same decision would have been reached, had the doctrine of the principal case been adopted. *Hildreth's Heirs* v. *M'Intire's Devisee* (Ky. 1829) 1 J. J. Marsh 206. The result of the principal case, however, may be reconciled with the majority of decisions requiring the existence of an office *de jure* since such an office has been defined as one potentially in existence, and the Municipal Court, though irregularly organized, was one provided for in the State Constitution, as distinguished from an office wholly unknown to the law. See *Buck* v. *City* (1895) 109 Cal. 504. Different results would be reached in the conflicting jurisdictions if an office was in existence by virtue of an unconstitutional statute. The rule as to *de facto* officers, a fiction adopted on grounds of public policy, might well be extended to such a case. This would avoid the infliction of hardship, as in the case of *Flaucher* v. *City* (1893) 56 N. J. L. 244.

HIGHWAYS—PUBLIC AND PRIVATE NUISANCES—PRESCRIPTION.—The vendee of a house, the lower portion of the front wall of which had for over twenty years encroached seven inches upon the highway, resisted specific performance of the purchase contract. A special statute had barred the public rights. *Held*, Houghton, J., dissenting, the encroachment had become legal. *556-8 Fifth Ave. Co.* v. *The Lotus Club* (1908) 40 N. Y. L. Jour. 74.

It is well established that a private nuisance may be prescribed for, *Dana* v. *Valentine* (Mass. 1842) 5 Metc. 8; *Stanner* v. *City of Albuquerque* (1900) 10 N. Mex. 491, and that, at common law, a public nuisance may not, *Cross* v. *Mayor of Morristown* (1867) 18 N. J. Eq. 305, but whether prescription will run against the private nuisance which is at the same time public, is unsettled. Wood, Nuisance (2nd Ed.) p. 790, art. 727. Prescription should not run when the private nuisance is purely an incident of the public nuisance. Thus, by encroaching upon the highway, one of two adjoining landlowners would intercept the other's light. This is actionable solely because an abutting owner has an easement of light and air over the highway. *Story* v. *N. Y. Elevated R. R. Co.* (1892) 90 N. Y. 122; *Dill* v. *Board of Education* (1890) 47 N. J. Eq. 421. Further, by presuming a grant in such cases, the law would necessarily derogate from the public right to an unencumbered highway. *Commonwealth* v. *King* (Mass. 1847) 13 Metc. 115. It is submitted, however, that when the public nuisance simply co-exists with a well-defined private nuisance, such as a nuisance of unwholesome vapors from a manufacturing plant, which becomes a public nuisance by reason of the growth of a town in the vicinity, or, of the obstruction of a way to which an individual had been entitled before it became public, a prescriptive right should be procurable. The decisions, however, though few, seem contrary. *Mills* v. *Hall* (N. Y. 1832) 9 Wend. 313. In cases arising under the first rule above mentioned the legalizing of the public nuisance eliminates the reason for denying a prescriptive right with reference to the remaining private nuisance. The presumption of a grant is then not in derogation of a public right, prescription is available, *Lewis* v. *New York & Harlem R. R. Co.* (1900) 162 N. Y. 202 at 223, and, therefore, the principal case is sound.

INSURANCE—DEATH OF BENEFICIARY BEFORE ASSURED—CHANGE OF BENEFICIARY.—The assured took out a policy for the benefit of his wife without mention of her heirs, etc. At her death, he named his daughter as beneficiary. *Held*, the daughter was entitled to recover. *Smith* v. *Metropolitan Life Ins. Co.* (Pa. 1908) 71 Atl. 11.

There is a considerable difference of opinion as to the nature of the interest which a beneficiary acquires in a policy of life insurance. Some authorities have held she is the donee of an unexecuted gift, and therefore acquires no absolute rights, *Union Mutual Life Ins. Co.* v. *Stevens* (1883) 19 Fed. 671; other courts hold that she is the recipient of an executed gift, *Brockhaus* v. *Kemma* (1881) 10 Bliss. 338; while a few assert that the beneficiary is the cestui of a trust, *Timayenis* v. *Ins. Co.* (1884) 22 Blackf. 405. However, the principle has become well established that the beneficiary acquires a vested interest in the policy, and the assured therefore cannot change the designation. *Bank* v. *Hume* (1888) 128 U. S. 195 at 206; *Ins. Co.* v. *Haley* (1886) 78 Me. 268. When the beneficiary dies before the assured, jurisdictions, once more, differ as to the effect on her interest. Influenced by a desire to carry out the assured's intentions, many courts have held that the beneficiary's rights reverted to the insured at the beneficiary's death, *Ryan* v. *Rothweiler* (1893) 50 Oh. St. 595; or became revocable. *Shields* v. *Sharpe* (1889) 35 Mo. App. 178. The majority, however, hold that the death of the beneficiary does not affect rights under the policy. *Ins. Co.* v. *Dunham* (1878) 46 Conn. 79; *Franklin Ins. Co.* v. *Galligan* (1903) 71 Ark. 295. Since the doctrine of the beneficiary's vested rights has become firmly established, this view is logical and consistent. However, no violence would be done the conception of the beneficiary's vested rights and a more just result might be reached, if, as

in the principal case, it were held that the survival of the beneficiary is an implied condition of the continuance of her interest.

INSURANCE—WARRANTIES—BURDEN OF PROOF.—The plaintiff in the policy of fire insurance on which he sued, warranted to keep safety appliances in good condition. *Held,* the burden of proof was on the defendant to prove a breach of the warranty as a defense. *Blakely Mill Co.* v. *Hartford Fire Ins. Co.* (Wash. 1908) 97 Pac. 781.

Warranties, whether affirmative or promissory, logically should be considered conditions precedent, since the untruth or non-performance of the warranty prevents the risk from attaching. *Hutchinson* v. *Western Ins. Co.* (1855) 21 Mo. 97; *Phoenix Ins. Co.* v. *Benton* (1882) 87 Ind. 132; *Petit* v. *German Ins. Co.* (1898) 98 Fed. 800. The weight of authority, however, casts upon the defendant the burden of proving a breach of warranty. Some courts regard warranties as mere matters of defeasance, *Redmond* v. *Aetna Ins. Co.* (1880) 49 Wis. 431; *Moody v. Ins. Co.* (1894) 52 Oh. St. 12, while others for reasons of convenience of proof, *Piedmont Ins. Co.* v. *Ewing* (1875) 92 U. S. 337, make a plea of breach of warranty a matter of defense regardless of the theoretical nature of the warranty. *Chambers* v. *Northwestern Ins. Co.* (1890) 64 Minn. 495. A few orthodox jurisdictions, however, still insist that ease in conducting a trial should not relieve of the necessity of proving a cause of action. *Wilson* v. *Hampden Fire Ins. Co.* (1856) 4 R. I. 159; *Hennessy* v. *Metropolitan Life Ins. Co.* (1902) 74 Conn. 699; *M'Loon* v. *Commercial Mutual Ins. Co.* (1868) 100 Mass. 472; *Fuller* v. *New York Fire Ins. Co.* (1903) 184 Mass. 12. The principal case is, however, in accord with the weight of authority.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONTRACTS PROVIDING FOR ANNUAL PAYMENTS.—A sewer was built for a city, which, being fully indebted and without funds, after acceptance arranged to pay for the work in annual instalments. *Held,* such payment was properly enjoined. *City of Logansport* v. *Jordan* (Ind. 1908) 85 N. E. 959.

It has been held, that the obligation of a contract pertaining to the ordinary expenses of a municipal corporation, does not constitute a debt, if, together with other like expenses, it is within the limit of current revenues. *Grant* v. *City of Davenport* (1873) 36 Ia. 396; *City of Erie's Appeal* (1879) 91 Pa. St. 398. But see *Prince* v. *City of Quincy* (1889) 128 Ill. 443; *Davenport* v. *Kleinschmidt* (1887) 6 Mont. 502. There is, however, some difference of opinion as to contracts obligating the corporation to make annual payments over a series of years. Even if the first payment can be upheld, because, though considered a debt, it is still within the authorized limit, or because it is treated as an ordinary expense within the current revenues, some courts hold that the aggregate amount ultimately due is a present debt, and must be added to the existing indebtedness to test the validity of the contract. *Beard* v. *City of Hopkinsville* (1894) 95 Ky. 239; *Niles Water Works* v. *Mayor* (1886) 59 Mich. 311, but cf. *Monroe Water Co.* v. *Heath* (1897) 115 Mich. 277; *State* v. *Medbury* (1857) 7 Oh. St. 522. In some cases, which accept this reasoning, it is possible to make the distinction that the corporation has become indebted *in praesenti* by contracting for the erection of a municipal plant, to be paid for by instalments or when completed, though this distinction has not been recognized. *Spelman* v. *City of Parkersburg* (1891) 35 W. Va. 605; *Culbertson* v. *City of Fulton* (1888) 127 Ill. 30; *Coulson* v. *City of Portland* (1868) Deady 481. The great weight of authority, however, tests the validity of a contract to pay for water or gas, as furnished, by the amount of the annual payment. *City of Valparaiso* v. *Gardner* (1884) 97 Ind. 1; *E. St. Louis* v. *E. St. L. Co.* (1881) 98 Ill. 415; *Smith* v. *Dedham* (1887) 144 Mass. 177. On construing the charter or statutes, in each case, the necessity for long-term contracts and the conditional liability of the corporation have prevailed thus to limit the meaning of municipal "indebtedness." The principal case is clearly sound, there being no contract for annual payments nor funds to pay a first instalment.

NEGOTIABLE INSTRUMENTS—PRESENTMENT BY TELEPHONE—WAIVER OF EXHIBITION.—The holder of the note on the day of maturity, by telephone, "called up" the maker at the place of the presentment, informing him that the note was held for collection. The maker, admitting his liability, refused to pay. Notice of non-payment was given the indorser. *Held*, this was a sufficient presentment for payment, exhibition of the instrument being waived and the indorser was liable. *Gilpin* v. *Savage* (1908) 112 N. Y. Supp. 802.

Exhibition of the instrument at presentment for payment may be dispensed with by a refusal to pay on other grounds, *Porter* v. *Thom*, (1899) 40 App. Div. 34; aff'd 167 N. Y. 584, or impossibility. *Thackerey* v. *Blackedt* (1812) 3 Camp. 164. At the time of presentment, however, opportunity for payment must be afforded, *Parker* v. *Stroudt* (1885) 98 N. Y. 379; *Simpson* v. *Pacific etc. Co.* (1872) 44 Cal. 139, and clearly the telephone gives no such opportunity. While the reasoning of the principal case does not commend itself, the result is supportable. The formal demand itself is not always required, the essential fact to be established as a proper basis for the notice to the indorser, being the certainty of a refusal occurring at the time and place of maturity. Accordingly, the absconding of the maker, *Lehman* v. *Jones* (Pa. 1841) 1 Watts & S. 126, or his death with no administration at the day of maturity, *Haslett* v. *Kunhart* (S. C. 1839) Rice 189; cf. also *Hale v. Burr* (1815) 12 Mass. 86, are held to make a presentment unnecessary; but the known insolvency of the one primarily liable has not the same effect. *Bassenhorst* v. *Wilby* (1887) 45 Oh. St. 340. Telephone conversations, the identity of the parties being known, are admissible as evidence, *Galt* v. *Woliver* (1902) 103 Ill. App. 71; see also 8 COLUMBIA LAW REVIEW 587, and, there being no question of identity in the principal case, the ultimate non-payment of the note at the time and place of maturity was definitely established and presentment itself was excused.

PARENT AND CHILD—PARENT'S DUTY TO SUPPORT—HELPLESS ADULT CHILD.—A parent supported an idiot son from birth to the age of forty-five. In an action to distribute the parent's estate, an attempt was made to charge the idiot with the value of his support since majority. *Held*, the parent's legal duty to support a helpless adult child prevented such a charge. *Crane* v. *Mallone* (Ky. 1908) 113 S. W. 67.

Whether a parent is under a common law obligation to maintain a minor child is disputed. Many American jurisdictions have held that such a duty exists. *Dennis* v. *Clark* (Mass. 1848) 2 Cush. 347; *Pretzinger* v. *Pretzinger* (1887) 45 Oh. St. 452; *Van Valkenburg* v. *Watson* (N. Y. 1816) 13 Johns. 480; but see *Raymond* v. *Loyl* (N. Y. 1851) 10 Barb. 483. This view has been justified by text-writers because the parent's criminal liability for failure to support, evidences a legal duty. Tiffany, Persons and Domestic Relations, 230. England and a minority of American jurisdictions have not deemed this consideration controlling, and unite in denying that the moral duty to support raises a legal obligation. *Mortimer* v. *Wright* (1840) 6 Mees. & W. 482; *Bazeley* v. *Forder* (1868) L. R. 3 Q. B. 559; *Kelly* v. *Davis* (1870) 49 N. H. 187; *Gordon* v. *Potter* (1845) 17 Vt. 348. Missouri, anomalously, denies the existence of such an obligation, and yet allows a quasi-contractual action against a parent, by a stranger furnishing the infant with necessaries. *Huke* v. *Huke* (1891) 44 Mo. App. 308; *St. Ferdinand Loretta Academy* v. *Bobb* (1873) 52 Mo. 357. Among jurisdictions where the legal duty is recognized, a difference exists as to the effect of emancipation. *Furman* v. *Van Sise* (1874) 56 N. Y. 435; *Porter* v. *Powell* (1890) 79 Ia. 151; *Angel* v. *McLellan* (1819) 16 Mass. 28. An insane person, however, does not become emancipated, even after majority. *Brown* v. *Ramsay* (N. J. 1860) 5 Dutch. 117; *King* v. *Inhab.* (1831) 2 Barn. & Ad. 861: and since Kentucky recognizes the duty to support, *Hedges* v. *Hedges* (1903) 24 Ky. L. Rep. 2220, principal case seems correctly decided.

POLICE POWER—LIMITATION OF THE HEIGHT OF ADVERTISING SIGNS.—An ordinance prohibited the erection of an advertising sign over nine feet above the cornice of the building to which it was attached. *Held*, such a taking of property was not sustainable under the police power. *People ex rel. Weinberg* v. *City of New York* (1908) 40 N. Y. Law Jour. No. 70.

As the police power must be exercised for the public good, *People etc.* v. *Haynor* (1896) 149 N. Y. 195, the purpose of an enactment is an important consideration. If a statute is passed to abolish aesthetic annoyance it will not be supported, unless compensation is provided for. 8 COLUMBIA LAW REVIEW 226. As the entire height of the building and sign together is no factor in the prohibition in the principal case, there can be no analogy to provisions for the public health, limiting the height of buildings in order to prevent the cutting off of light and air. *Welch* v. *Swasey* (1907) 193 Mass. 364. To say that the purpose of public safety, even though the court may declare it common knowledge that advertising structures are usually poorly built, *In re Wilshire* (1900) 103 Fed. 620, is not satisfactory, since it is not evident that signs above the limit are likely to be dangerous to the public. *The Bill Posting Etc Co.* v. *Atlantic City* (1904) 71 N. J. L. 72. Furthermore, the use and not the nature of the structure seems to be the basis of prohibition. *City of Passaic* v. *Patterson etc. Co.* 72 N. J. L. 285. While other regulations of the height of advertising signs have been upheld, *City of Rochester* v. *West* (1900) 164 N. Y. 512, they are distinguishable as not unqualifiedly prohibiting the erection of such structures, above a given height. The holding of the principal case is in accord with decisions on other analogous enactments. *Western etc. Co.* v. *Knickerbocker* (1894) 103 Cal. 111; *Bostock* v. *Sams* (1902) 92 Md. 400.

PUBLIC SERVICE COMPANIES—FRANCHISE—NATURE OF.—Under a statute (L. N. Y. 1884 c. 367) authorizing such action, the defendant company was formed by the union of several independent companies. The franchises held by the consolidating companies were valued at $7,781,000 and stock of the new company issued on that amount. A statute fixing the price of gas at eighty cents per thousand feet was alleged confiscatory. *Held*, the original franchise valuation having been authorized by the statute and the stock issued on it largely dealt in by the public, it must be included in the capital on which the company is entitled to a reasonable return. But as the value of the franchise depends on the earnings and these may be diminished by rate regulation, there should be no addition to the capital on account of any supposed increased value of the franchise. Eliminating the estimated amount of this increase, the rate is not shown to be confiscatory. *Willcox et al.* v. *Consolidated Gas Co.* (1909), Supreme Court of the U. S. October Term 1908, Nos. 396, 397 and 398. See Notes, p. 160.

RAILROADS—LANDS NOT NECESSARY FOR PUBLIC USE—ADVERSE POSSESSION.—The plaintiff sued to quiet title against a claim by adverse possession to part of the land dedicated on a town plat for a railway-station. The disputed land did not seem likely to become necessary for railway uses. *Held*, not to be endowed with a public use, so as to be exempt from acquisition by adverse possession. *Chicago M. & St. P. Ry. Co.* v. *Hanken et al.* (Ia. 1908) 118 N. W. 527.

At common law, dedications could only be made to the public as such, and not to a private or quasi-public company. *Lake Erie etc. Co.* v. *Whitham* (1895) 155 Ill. 514, 529; *Watson* v. *Chicago etc. Co.* (1891) 46 Minn. 321, 325. Where a statute permits such dedication, or where by the terms of a legislative grant, the amount of land for a right of way and station-property is specified, that amount is conclusively presumed to be necessary for such purposes. *Southern Pacific Co.* v. *Burr* (1890) 86 Cal. 279, 284; *Central Pacific R. R. Co.* v. *Benity* (1878) 5 Sawy. 118, 120. The Iowa statute, in question, however, provided for so much land as might be necessary for stations; and under the court's finding that the disputed land was not necessary for a station, the plaintiff might have been defeated for want

of title. Assuming, as the court did, that the plaintiff had title, it is submitted that, even in the minority of jurisdictions where railroad land cannot be acquired by adverse possession because endowed with a public use, *Southern Pacific Co.* v. *Hyatt* (1901) 132 Cal. 240; 6 COLUMBIA LAW REVIEW 61, land not required for such a use and not so endowed should be considered as though held by a private owner. See *Matter of Rochester Water Commissioners* (1876) 66 N. Y. 413, 418. Accordingly, the principal case appears sound in allowing the acquisition of such land by adverse possession.

REAL PROPERTY—POSSIBILITY OF REVERTER—ALIENATION.—A father conveyed a conditional fee to his daughter who died without issue after him. It was alleged by her alienees that the conditional fee had become a fee simple absolute by merger, as she was the residuary devisee of her father. *Held,* the possibility of reverter is not an estate, is neither descendible nor devisable, and cannot be released by will. *Vaughn* v. *Lanford* (S. C. 1908) 62 S. E. 316. See Notes, p. 170.

RECEIVERS' CERTIFICATES—PRIVATE CORPORATIONS—CONSENT OF MORTGAGE TRUSTEE.—Upon an application by the receiver of a private corporation to issue certificates for the purpose of paying insurance premiums and the interest on a mortgage about to be foreclosed, the trustee of a mortgage securing a bond issue consented to their issuance for the first purpose but objected to their issue for the last. *Held,* the receiver might issue the certificates irrespective of trustee's consent since necessary for the preservation of the property. *Lockport Felt Co.* v. *The Boardbox Co.* (N. J. 1908) 70 Atl. 980. See Notes, p. 172.

SALES—WARRANTY—FITNESS FOR A PARTICULAR USE.—A vendee stated he intended to use coal to burn brick. The vendor replied that his coal was used for such purposes. In an action for the purchase price, the defendant did not allege a warranty. *Held,* even though a warranty were pleaded, evidence of the conversation was inadmissible to prove the vendor intended a warranty. *Wooldridge* v. *Brown* (N. C. 1908) 62 S. E. 1076.

Many jurisdictions, including North Carolina, require that before the vendor be held on a warranty, proof be given that a warranty was intended. *Foster* v. *Caldwell* (1846) 18 Vt. 176; *McFarland* v. *Newman* (Pa. 1839) 9 Watts 55; *Horton* v. *Green* (1872) 66 N. C. 596. Preferably, irrespective of intention, any positive assertion as to the character or quality of the goods if understood by the vendee as a warranty should bind the vendor. *Warder* v. *Bowen* (1883) 31 Minn. 335; *Hawkins* v. *Pemberton* (1872) 51 N. Y. 198; *Ingraham* v. *Union R. R. Co.* (1896) 19 R. I. 356. It is for the jury to determine how the words were understood by the parties. *Rogers* v. *Ackerman* (N. Y. 1856) 22 Barb. 134. Where, however, the vendor knows the intended use for which the article is purchased, a warranty of fitness is implied by law. *Little* v. *Van Syckle & Co.* (1898) 115 Mich. 480; *Beals* v. *Olmstead* (1852) 24 Vt. 114. Though some jurisdictions refuse to imply a warranty of fitness, if the vendor be only a dealer. *Forcite Powder Co.* v. *Brady* (N. Y. 1896) 4 App. Div. 95. Whether the vendor, in the principal case was a dealer, or a manufacturer, is not clear. However, under proper pleadings, in facts similar to the principal case, the evidence offered might have been admitted on one of two theories. If the vendor were a manufacturer the evidence would be competent to show he knew the intended use and thus furnish a basis for the implication of a warranty of fitness. If the vendor were a dealer the evidence would be competent in many jurisdictions for the same reason; while the testimony should be admitted to prove an express warranty. *Murray* v. *Smith* (N. Y. 1872) 4 Daly 277.

SUBROGATION—VOLUNTEERS—INCHOATE DOWER.—A wife paid from her own funds, taxes levied on the land of her husband who was living, but in-

competent. *Held,* she was entitled to be subrogated to the lien of the taxes. *In re Brown's Estate* (1908) 112 N. Y. Supp. 599.

A widow, entitled to dower, not yet assigned, who pays taxes, will be subrogated to their paramount lien. *Simmons* v. *Lyle* (Va. 1880) 32 Gratt. 752. If the right of dower is still inchoate, as in the principal case, subrogation should still be allowed. Those states which require no *actual* interest in the property protected could not consistently deny the claim. *John* v. *Connell* (1901) 61 Neb. 267; *Willson* v. *Brown* (1882) 82 Ind. 471. In New York a volunteer is more strictly defined, and subrogation will not be granted to one who, not being personally liable, has no property chargeable with payment of the incumbrance removed. *Kohler* v. *Hughes* (1896) 148 N. Y. 507; See 9 COLUMBIA LAW REVIEW 64. But a contingent right in realty is a sufficient interest at hazard. *Pease* v. *Egan* (1892) 131 N. Y. 262. Inchoate dower is such a contingent interest, *Bullard* v. *Briggs* (Mass. 1829) 7 Pick. 533, and is defined as a "substantial right, possessing, in contemplation of law, the attributes of property." 2 Scribner, Dower 8. Thus it is an existing incumbrance within the covenant against incumbrances. *Jones* v. *Gardner* (N. Y. 1813) 10 John. 265; *Shearer* v. *Ranger* (Mass. 1839) 22 Pick. 447. It has been protected against sales in partition proceedings, N. Y. Code Civ. Pro. § 1570, and its value, as computed, may be retained from the proceeds of the sale as the wife's absolute property. *Bartlett* v. *Van Zandt* (N. Y. 1846) 4 Sandf. Ch. 424. Its release is good consideration for the conveyance of an equity of redemption. *Bullard* v. *Briggs, supra.* The New York courts have repeatedly protected the rights of the wife, as well as of the widow. *Mills* v. *Van Voorhies* (1859) 20 N. Y. 412; *Simon* v. *Canaday* (1873) 53 N. Y. 298. It cannot be doubted that they would regard inchoate dower as a sufficient interest in a wife, who has paid taxes under reasonable necessity, to avoid the rule denying subrogation to volunteers.

TAXATION—NEW JERSEY TRANSFER TAX ACT—NON-RESIDENT DECEDENT.—A stockholder in a New Jersey corporation died domiciled in England, having bequeathed his stock to a person also there domiciled. *Held,* three judges dissenting, the transfer was not subject to a collateral inheritance tax. *Neilson* v. *Russell* (N. J. 1908) 71 Atl. Rep. 286.

Collateral inheritance taxes being imposed upon the succession and not upon the property would not ordinarily reach a transfer of personal property of a non-resident decedent, under the rule that succession is governed by the law of the domicile. However, a state may in its sovereign capacity create a succession at the real *situs* of the property if that property be within its jurisdiction. 8 COLUMBIA LAW REVIEW 398; *Eidman* v. *Martinez* (1902) 184 U. S. 578. After such legislation the question becomes one primarily of statutory construction, *Eidman* v. *Martinez, supra.* The New Jersey Legislature having taxed all property of resident decedents passing "by will or the intestate laws of this State," N. J. L. (1894) Chap. 110, § 1, further taxed all property within the State "passing by inheritance, distribution, bequest or devise," without limitation as to which laws should govern such successions. Moreover, these words include all forms of transfer by will or intestacy, and avoid the difficulty arising under the more ambiguous New York Statute. *Matter of Romaine* (1891) 127 N. Y. 80. Section 11 of the N. J. act, since the completeness of a foreign executor's or administrator's title is recognized by comity, *In re Cape May etc. Co.* (1888) 51 N. J. L. 78, argues that the state intended to tax stock transfers, through a special exercise of its sovereignty, and shows that personalty was intended to be embraced by the words "all property" in § 1. Consequently the interpretation in the principal case seems unwarranted. The decision, even if accepted, should, however, be short-lived since the personalty of non-resident decedents ought to be subject to a transfer tax under a later statute, N. J. Laws 1906 432, § 1, the wording of which complies with the demands in the principal case. This result, moreover, would accord with that reached in New York, *Matter of Bronson* (1896) 150 N. Y. 1, and rightly so, inasmuch

as the latest New Jersey enactment is but a copy of the New York statute L. 1892 ch. 814 § 1, the adoption of which should include the construction put thereon by the New York courts. *State* v. *Kuhl* (1889) 51 N. J. L. 191, 199.

TAXATION—SPECIAL ASSESSMENTS—POLICE POWER.—Land occupied by railroad tracks was assessed, according to its frontage on the city street, for the construction of a sewer therein. *Held,* the question of whether the land was benefited was of no importance as the levy was properly made under the police power. *C. M. & St. P. etc. Co.* v. *City of Janesville* (Wis. 1908) 118 N. W. 181.

The cost of a local improvement may be assessed upon property in the district, proportioned according to the benefits received. *White* v. *Gove* (1903) 183 Mass. 133. While such assessments, not being general taxes are not within an exemption from taxation allowed to charitable institutions, *Boston etc. Soc.* v. *Mayor etc. of Boston* (1874) 116 Mass. 181, they are usually considered an exercise of the taxing power. *Dalrymple* v. *City of Milwaukee* (1881) 53 Wis. 178. Levies made under the police power are for regulation, while those made under the taxing power are for revenue, and though a levy may have the elements of both powers, its primary purpose is the one to be considered. *Reelfoot etc. Dist.* v. *Dawson* (1896) 97 Tenn. 151. There is authority for holding that sewer construction assessments are a valid exercise of the police power, *City of Pueblo* v. *Robinson* (1889) 12 Colo. 593, but it is submitted that these charges are primarily for the purpose of paying the cost of the improvement, since there are usually absent such regulative features, as compelling sewer connections with the property, as in *Van Wagoner* v. *City of Paterson* (1902) 67 N. J. L. 455, on which decision the principal case relies. See *Doughten* v. *Camden* (1905) 72 N. J. L. 451. While the reasoning of the principal case is not convincing, the result would be supportable in many jurisdictions. The determination of the method of apportioning special assessments according to benefits, is a legislative function reviewable by the courts only in clear cases of unreasonableness. *French* v. *Barber* (1901) 181 U. S. 302. As to city lots, the front foot rule is often accepted as a just means of arriving at the amount to be charged. *Northern etc. Co.* v. *Connely* (1859) 100 Oh. St. 159. In those jurisdictions, including Wisconsin, not accepting the front foot rule, the principal case is open to attack. *Doughten* v. *Camden, supra.*

TELEGRAPHS AND TELEPHONES—LIMITATION OF LIABILITY BY SENDER—TORT RECOVERY BY SENDEE.—A sendee of a telegraph message sued in tort, for damages resulting from the negligent alteration of a message sent at his request. *Held,* the sendee could recover only nominal damages, as stipulated for in the contract blank, signed by the sender. *Halsted et al.* v. *Postal Telegraph Co.* (N. Y. 1908) 85 N. E. 1078.

The sender's right to limit the liability of the company for its negligent misfeasance toward the sendee is disputed, owing to the different conceptions of the legal duty which the company owes the receiver. The Massachusetts doctrine is that the duty only arises because of the sender's contract, and that its extent is necessarily measured by the terms of that contract. *Ellis* v. *Amer. Tel. Co.* (1886) 95 Mass. 226, 238. The fallacy of this position would seem to be that the contract of limitation merely affects the amount of recovery by the sender, but does not alter the common law duty of the company to exercise due care. It has been suggested that a separate duty toward the sendee arises from the representation by the company that its messages are correct. Bigelow, Torts 602. The better view is that public-service corporations must transmit with reasonable care, all messages for all those whom they may undertake to serve. *W. U. Tel Co.* v. *Short* (1890) 53 Ark. 434. This duty to the sendee is entirely distinct and totally independent of the sender's contract. *Mentzner* v. *W. U. Tel. Co.* (1895) 93 Ia. 752; *W. U. Tel. Co.* v. *Dubois* (1889) 128 Ill. 248; Bur-

dick, Torts (2nd Ed.) 491. Manifestly, therefore, if the sendee stands neither in the relation of principal nor agent, to the sender, the latter has no power to bind the sendee by any such stipulations. (See case below, dissenting opinion.) *McCord* v. *W. U. Tel. Co.* (1888) 39 Minn. 181, 183. The principal case may, only, be supported, by accepting the finding of the court that the sendee's request made the sender his agent.

TRESPASS—DOGS NOT TRESPASSERS.—Defendant's dog, suddenly becoming mad, ran upon plaintiff's land and bit the plaintiff's cow. Plaintiff sued for the resulting injury. *Held,* defendant was not liable without proof of knowledge of the dog's viciousness. *Van Etten* v. *Noyes* (1908) 112 N. Y. Supp. 888.

The general rule is that owners are liable for the trespasses of their domestic animals, *Decker* v. *Gammon* (1857) 44 Me. 322, 329; but since there was no absolute property in dogs, and they were considered naturally harmless, an exception was early made that the owner's liability should depend on his knowledge of the dog's vicious propensity. Holt, C. J., in *Mason* v. *Keeling* (1700) 12 Mod. 332. There is now property in dogs for all purposes, 8 COLUMBIA LAW REVIEW, 147; but the majority of courts seem to continue the exception on the ground that trespassing dogs are not apt to do damage. 2 Cooley, Torts (3rd Ed.) 691; *Sanders* v. *Teape* (1884) 51 L. T. N. S. 263. *Cf. Elliott* v. *Herz* (1874) 29 Mich. 202. The New York cases cited in the principal case are not decisive, although they contain pertinent *dicta. O'Connell* v. *Jarvis* (1897) 13 App. Div. 3; *Buchanan* v. *Stout* (1908) 123 App. Div. 648. A few courts have rejected the exception, and have applied the general rule even to the case of dogs, *Doyle* v. *Vance* (1880) 6 Vict. L. R. (cases at law) 87; *Chunot* v. *Larson* (1878) 43 Wis. 536, 541; and the same result has been achieved, wholly or in part, by many statutes. *Newton* v. *Gordon* (1888) 72 Mich. 642; *Orne* v. *Roberts* (1871) 51 N. H. 110, 113; *McAdams* v. *Sutton* (1873) 24 Oh. St. 333. The principal case, however, is in accord with the weight of authority.

WATERS AND WATERCOURSES—PUBLIC RIGHTS IN THE FORESHORE.—The defendant, an upland owner, built a wharf which unnecessarily obstructed passage along the shore. *Held,* in a suit to enjoin the continuance of the obstruction, that the right of passage along the shore is a public right incidental to the rights of fishing, bathing, and boating. *Barnes* v. *Midland Railway Terminal Co.* 40 N. Y. Law Journal 927. See Notes, p. 174.

WILLS—TESTATOR DOMICILED ABROAD—WILL PROBATED IN NEW YORK.—A testator domiciled in France executed a will, the formalities of which conformed to New York law, but were insufficient under the French law. The will was offered for probate in New York. *Held,* two judges dissenting, the will was admissible under Code Civ. Proc. § 2611, which admits to probate a will executed according to New York law, irrespective of § 2694 which provides that testamentary dispositions are to be governed by the law of the domicile of the testator. *In re Reuben's Will* (1908) 112 N. Y. Supp. 941.

The position of the principal case seems to lead to a logical inconsistency. The situs of personality being at the testator's domicile, testamentary distribution should be made according to the *lex domicilii. Moltrie* v. *Hunt* (1861) 23 N. Y. 394. Accordingly, his testamentary acts must conform to that law, *Cong. Soc.* v. *Hale* (1898) 29 App. Div. 396, and whether the decedent, in the principal case, was testate or intestate should properly be referable to the law of France. *Price* v. *Dewhurst* (1837) 8 Sim. 279; *Desesbats* v. *Berkuier* (Pa. 1808) 1 Binn. 336. The court, however, admits a will to probate in New York even though in France the deceased was intestate. As a result, if the testamentary dispositions are valid under the French law, which according to Code Civ. Proc. § 2694, determines their legality, rights might vest in the legatees though in France the property would descend differently, under the intestacy law. This would

violate the rule that the *lex domicilii* must determine where the title goes. *Dammert* v. *Osborne* (1893) 140 N. Y. 30. The construction of the dissenting judges appears preferable, but if the history of Code Civ. Proc. § 2611 (see Laws of 1876, ch. 118, expressly admitting wills of some non-residents when made in accord with New York law) would defeat such an interpretation, more legislation is needed to correct the inconsistency.